

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Nov 22, 2022**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KYLE S.,<sup>1</sup>

Plaintiff,

v.

KILOLO KIJAKAZI, Acting  
Commissioner of Social Security,

Defendant.

No. 2:21-cv-341-EFS

**ORDER GRANTING PLAINTIFF'S  
SUMMARY-JUDGMENT MOTION,  
DENYING DEFENDANT'S  
SUMMARY-JUDGMENT MOTION,  
AND REMANDING FOR FURTHER  
PROCEEDINGS**

Plaintiff Kyle S. appeals the denial of benefits by the Administrative Law Judge (ALJ). Because the ALJ did not consider the medical examiners' other offered reasons for Plaintiff's inconsistent test results, the ALJ's decision to discount the medical examiners' opinions because Plaintiff may have exaggerated his symptoms is not supported by substantial evidence. This error, amongst others, requires remand for further proceedings.

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<sup>1</sup> For privacy reasons, Plaintiff is referred to by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

## I. Five-Step Disability Determination

A five-step evaluation determines whether an adult claimant is disabled. Step one assesses whether the claimant is engaged in substantial gainful activity.<sup>2</sup> Step two assesses whether the claimant has a medically severe impairment or combination of impairments that significantly limit the claimant's physical or mental ability to do basic work activities.<sup>3</sup> Step three compares the claimant's impairment or combination of impairments to several recognized by the Commissioner to be so severe as to preclude substantial gainful activity.<sup>4</sup> Step four assesses whether an impairment prevents the claimant from performing work she performed in the past by determining the claimant's residual functional capacity (RFC).<sup>5</sup> Step five assesses whether the claimant can perform other substantial gainful work—work that exists in significant numbers in the national economy—considering the claimant's RFC, age, education, and work experience.<sup>6</sup>

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<sup>2</sup> 20 C.F.R. § 404.1520(a)(4)(i), 416.920(a)(4)(i).

<sup>3</sup> *Id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

<sup>4</sup> *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

<sup>5</sup> *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

<sup>6</sup> *Id.* §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497–98 (9th Cir. 1984).

1 The claimant has the initial burden of establishing he is entitled to disability  
2 benefits under steps one through four.<sup>7</sup> At step five, the burden shifts to the  
3 Commissioner to show the claimant is not entitled to benefits.<sup>8</sup>

## 4 II. Background

5 Plaintiff filed Title 2 and 16 applications alleging disability because of  
6 depression, dependent personality disorder, anxiety disorder, posttraumatic stress  
7 disorder (PTSD), recurrent headaches, seizures, and a lower-back condition.<sup>9</sup>  
8 Plaintiff seeks disability for the period of August 15, 2018, to June 15, 2020. After  
9 the agency denied his applications initially and on reconsideration, Plaintiff  
10 requested a hearing before an ALJ.<sup>10</sup>

11 ALJ Donna Walker held a telephonic hearing in November 2020 during  
12 which Plaintiff, two medical experts, and a vocational expert testified.<sup>11</sup> Plaintiff,  
13 who was then 27 years old, testified that he had struggled in school even though he  
14 was in smaller-class sizes, he did not complete high school, he is unable to read a  
15 newspaper, and he gets flustered when stressed.<sup>12</sup> He testified that in June 2020  
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17 <sup>7</sup> *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

18 <sup>8</sup> *Id.*

19 <sup>9</sup> AR 259–68.

20 <sup>10</sup> AR 137–48, 151–56.

21 <sup>11</sup> AR 36–74.

22 <sup>12</sup> AR 60–61.

1 he began working at a business with family and friends and that they are very  
2 flexible and patient with him, allowing him to not attend work if he has headaches  
3 or feels like he is going to have a seizure, permitting him to leave early if he gets  
4 emotionally unable to continue working, and forgiving when he commits costly  
5 mistakes or has an angry outburst.<sup>13</sup> Plaintiff also testified that the medication he  
6 takes for his seizures causes him to be depressed and/or angry, with loss of appetite  
7 and diminished concentration.<sup>14</sup>

8 After the hearing, the ALJ denied Plaintiff's disability applications.<sup>15</sup> As to  
9 the sequential disability analysis, the ALJ found:

- 10 • Plaintiff met the insured status requirements through June 30, 2022.
- 11 • Step one: Plaintiff had not engaged in substantial gainful activity  
12 since August 15, 2018, the alleged onset date.
- 13 • Step two: Plaintiff had the following medically determinable severe  
14 impairments: seizures, headaches, degenerative disc disease, major  
15 depressive disorder, generalized anxiety disorder, attention-deficit  
16 hyperactivity disorder, and PTSD.

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20 <sup>13</sup> AR 61–67.

21 <sup>14</sup> AR 63–65.

22 <sup>15</sup> AR 12–35.

- 1           • Step three: Plaintiff did not have an impairment or combination of
- 2           impairments that met or medically equaled the severity of one of the
- 3           listed impairments.
- 4           • RFC: Plaintiff had the RFC to perform light work with the following
- 5           limitations:

6           Regarding postural abilities, the claimant has the ability to  
7           perform all postural activities frequently (2/3 of the  
8           workday); except stooping (i.e., bend at the waist) is limited  
9           to occasionally (1/3 of the workday); and should never climb  
10          ladder, ropes or scaffolds. The claimant has no limitations  
11          regarding the ability to handle, finger or feel, reach in all  
12          directions, including overhead, see, hear or communicate.  
13          Regarding the environment, the claimant has no limitations,  
14          except he should avoid concentrated exposure to vibration  
15          and hazards, such as dangerous machinery and unprotected  
16          heights, open bodies of water. Regarding mental abilities,  
17          the claimant has the ability to understand, remember or  
18          apply information that is simple and routine, commensurate  
19          with SVP 2. Regarding interaction with others, the claimant  
20          would work best in an environment in proximity to, but not  
21          close cooperation, with co-workers and supervisors, and  
22          must work in an environment away from the public. With  
23          legally required breaks, the claimant has the ability to  
concentrate, persist and maintain pace. Regarding the  
ability to adapt or manage; the claimant would work best in  
an environment that is routine, repetitive, low pressure, low  
stress, and predictable, but does have the ability to respond  
appropriately, distinguish between acceptable and  
unacceptable work performance; or be aware of normal  
hazards and take appropriate precautions.

- 19          • Step four: Plaintiff was unable to perform past relevant work.
- 20          • Step five: considering Plaintiff's RFC, age, education, and work
- 21          history, Plaintiff could perform work that existed in significant
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1 numbers in the national economy, such as product assembler,  
2 assembler of electrical accessories, and routing clerk.<sup>16</sup>

3 In reaching her decision, the ALJ found:

- 4 • persuasive the reviewing opinions of Bruce Eather, Ph.D., John  
5 Nance, Psy.D., Desmond Tuason, M.D., and Keweli Amusa, M.D.;
- 6 • partially persuasive the reviewing opinion of Dana Harmon, Ph.D.,  
7 and the examining opinions of William Drenguis, M.D., and Thomas  
8 Genthe, Ph.D.; and
- 9 • unpersuasive the examining opinion of Catherine MacLennan, Ph.D.,  
10 and the reviewing opinion of Merry Alto, M.D.<sup>17</sup>

11 The ALJ also found Plaintiff's medically determinable impairments could  
12 reasonably be expected to cause some of the alleged symptoms, but his statements  
13 concerning the intensity, persistence, and limiting effects of those symptoms were  
14 inconsistent with the evidence.<sup>18</sup>

15 Plaintiff requested review of the ALJ's decision by the Appeals Council,  
16 which denied review.<sup>19</sup> Plaintiff timely appealed to the Court.

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19 <sup>16</sup> AR 17–30.

20 <sup>17</sup> AR 24–28.

21 <sup>18</sup> AR 21–24.

22 <sup>19</sup> AR 1–6.

### III. Standard of Review

A district court's review of the Commissioner's final decision is limited.<sup>20</sup> The Commissioner's decision is set aside "only if it is not supported by substantial evidence or is based on legal error."<sup>21</sup> Substantial evidence is "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>22</sup> Moreover, because it is the role of the ALJ—and not the Court—to weigh conflicting evidence, the Court upholds the ALJ's findings "if they are supported by inferences reasonably drawn from the record."<sup>23</sup> The Court considers the entire record.<sup>24</sup>

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<sup>20</sup> 42 U.S.C. § 405(g).

<sup>21</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

<sup>22</sup> *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).

<sup>23</sup> *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

<sup>24</sup> *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion," not simply the evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that such evidence was not considered[.]").

1 Further, the Court may not reverse an ALJ decision due to a harmless  
 2 error.<sup>25</sup> An error is harmless “where it is inconsequential to the ultimate  
 3 nondisability determination.”<sup>26</sup>

#### 4 IV. Analysis

##### 5 A. Medical Opinions: Plaintiff establishes consequential error.

6 Plaintiff argues the ALJ erred when considering whether the opinions of  
 7 Dr. Genthe and Dr. MacLennan were supported by and consistent with the record.  
 8 As discussed below, the ALJ’s analysis as to these medical opinions was  
 9 inadequately explained and not supported by substantial evidence.

##### 10 1. Standard

11 The ALJ was required to consider and evaluate the persuasiveness of the  
 12 medical opinions.<sup>27</sup> The factors for evaluating the persuasiveness of medical  
 13 opinions include, but are not limited to, supportability, consistency, relationship  
 14 with the claimant, and specialization.<sup>28</sup> Supportability and consistency are the  
 15 most important factors, and the ALJ is required to explain how both factors were  
 16 considered.<sup>29</sup>

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18 <sup>25</sup> *Molina*, 674 F.3d at 1111.

19 <sup>26</sup> *Id.* at 1115 (cleaned up).

20 <sup>27</sup> 20 C.F.R. §§ 404.1520c(a), (b), 416.920c(a), (b).

21 <sup>28</sup> *Id.* §§ 404.1520c(c)(1)–(5), 416.920c(c)(1)–(5).

22 <sup>29</sup> *Id.* §§ 404.1520c(b)(2), 416.920c(b)(2).



1           2.     Dr. Genthe

2           In February 2019, Dr. Genthe conducted a psychological evaluation of  
3 Plaintiff.<sup>30</sup> Dr. Genthe observed that Plaintiff, while cooperative, provided  
4 excessive amounts of detail in response to questions, appeared distressed, had mild  
5 difficulties following the conversation, and did not understand a proverb.

6 Dr. Genthe diagnosed Plaintiff with major depressive disorder with anxious  
7 distress, panic disorder, PTSD, attention-deficit/hyperactivity disorder with  
8 combined presentation, and mild cannabis use disorder. Dr. Genthe opined that  
9 Plaintiff was:

- 10           • moderately limited in his abilities to learn new tasks, perform routine  
11 tasks without special supervision, be aware of normal hazards and take  
12 appropriate precautions, ask simple questions or request assistance, set  
13 realistic goals and plan independently, and perform activities within a  
14 schedule, maintain regular attendance, and be punctual within  
15 customary tolerances without special supervision, and
- 16           • markedly limited in his abilities to adapt to changes in a routine work  
17 setting, communicate and perform effectively in a work setting, maintain  
18 appropriate behavior in a work setting, complete a normal workday and  
19 workweek without interruptions from psychologically based symptoms,

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23           <sup>30</sup> AR 533–39.

1 and understand, remember, and persist in tasks by following detailed  
2 instructions.

3 Dr. Genthe found that the effects on Plaintiff's basic work activities were not the  
4 result of a substance use disorder, though he recommended a chemical dependency  
5 assessment and vocational training or services.

6 The ALJ discounted Dr. Genthe's opinion because 1) Dr. Genthe noted that  
7 malingering was a possibility, 2) Plaintiff's symptoms were not being managed by  
8 treatment and Plaintiff's symptoms showed significant improvement with  
9 treatment after Dr. Genthe's evaluation, and 3) Plaintiff demonstrated an ability to  
10 recognize inappropriate behavior and apologize for it.<sup>31</sup>

11 First, as to Dr. Genthe's note that Plaintiff "tended to portray himself in an  
12 especially negative or pathological manner,"<sup>32</sup> evidence that a claimant  
13 exaggerated his symptoms, and therefore the medical opinion may not be  
14 supported by reliable test data, was a relevant factor for the ALJ to consider when  
15 assessing whether the medical opinion was supported by and/or consistent with the  
16 evidence.<sup>33</sup> Here, Dr. Genthe conducted a Personality Assessment Inventory (PAI)

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18 <sup>31</sup> AR 25–26.

19 <sup>32</sup> AR 539.

20 <sup>33</sup> *Tomassetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); *Swenson v. Sullivan*,  
21 876 F.2d 683, 687 (9th Cir. 1989); *see also Carmickle v. Comm'r, Soc. Sec. Admin.*,  
22 533 F.3d 1155, 1160 n. 1 (9th Cir. 2008).

1 and noted that Plaintiff's scores suggested some problems in understanding or  
2 attending appropriately to the PAI:

3 There appear to have been some idiosyncratic responses to particular  
4 items, and there were also some inconsistent responses to items with  
5 highly similar content. There are several potential reasons for this  
6 pattern, including **reading difficulties, careless or random  
7 responding, confusion, attempts at impression management,  
8 or failure to follow the test instructions.**

9 . . . . Certain of the [positive impression management] indicators fall  
10 outside of the normal range, suggesting that the respondent may not  
11 have answered in a completely forthright manner; the nature of his  
12 responses might lead the evaluator to form a somewhat inaccurate  
13 impression of the client based upon the style of responding described  
14 below. With respect to positive impression management, there is no  
15 evidence to suggest that the respondent was unduly defensive or  
16 motivated to portray himself as being relatively free of common  
17 shortcomings or minor faults.

18 With respect to negative impression management, there are  
19 indications suggesting that the client tended to portray himself in an  
20 especially negative or pathological manner. Some deliberate distortion  
21 of the clinical picture may be present; the critical items should be  
22 reviewed to evaluate the possibility of malingering. **Also, such  
23 results often indicate a cry for help, or an extreme or  
exaggerated negative evaluation of oneself and one's life.**  
Regardless of the cause, THE TEST RESULTS POTENTIALLY  
INVOLVE CONSIDERABLE DISTORTION AND ARE UNLIKELY  
TO BE AN ACCURATE REFLECTION OF THE RESPONDENT'S  
OBJECTIVE CLINICAL STATUS. THIS MAKES PARTICULAR  
SENSE BECAUSE HE ALTERNATIVELY ANSWERED  
QUESTIONS AS [VERY TRUE] OR [MOSTLY TRUE].<sup>34</sup>

Dr. Genthe clearly questioned the PAI test results. Dr. Genthe identified not only  
malingering as the possible cause, but also: a cry for help, an extreme negative self-  
evaluation, reading difficulties, careless or random responding, confusion, or

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<sup>34</sup> AR 539 (bolding added).

1 failure to follow the test instructions. In discounting Dr. Genthe's opinion, the ALJ  
2 only mentioned the concern about malingering and did not discuss the other  
3 reasons offered by Dr. Genthe. However, the record contains evidence that Plaintiff  
4 had reading and learning difficulties: Plaintiff's school reports indicate that he  
5 struggled at school, taking several classes pass/fail and earning a high school GPA  
6 of 1.4.<sup>35</sup> Plus, during a separate psychological evaluation, Dr. MacLennan observed  
7 that Plaintiff had a difficult time following the conversation and was confusing to  
8 interview.<sup>36</sup> Dr. MacLennan's observations were consistent with the interview  
9 notes of Social Security Administration (SSA) staff.<sup>37</sup>

10 [Plaintiff] was polite and pleasant, participated in the interview with  
11 appropriate eye contact. However, he struggled a lot with  
12 concentration and staying on topic. I had to redirect him several times  
13 throughout the interview. He went into great detail about things and  
14 some that did not seem relevant to the question I asked. He would  
then repeat the same information he already told me once or twice  
before. The interview took two hours and in that time [Plaintiff]  
sometimes seemed to have trouble with logic and would take about  
many different things at once. He was difficult to follow sometimes.

15 On this record, which reflects that Plaintiff had reading difficulties and confusion,  
16 the ALJ erred by not discussing the evidence consistent with the non-malingering  
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20 <sup>35</sup> AR 380-93.

21 <sup>36</sup> AR 438.

22 <sup>37</sup> AR 338.

1 reasons identified by Dr. Genthe as potential causes for Plaintiff's exaggerated  
2 symptoms and resulting inconsistent test results.<sup>38</sup>

3 Second, the ALJ discounted Dr. Genthe's opinion because Plaintiff was not  
4 receiving mental-health treatment at the time of the February 2019 psychological  
5 examination and then Plaintiff showed significant improvement after treatment.  
6 An ALJ may consider whether treatment would improve a claimant's symptoms  
7 such that he would be able to sustain fulltime work.<sup>39</sup> Here, as to treatment,  
8 Dr. Genthe wrote:

9 At this time, his symptoms are not being managed, which are likely to  
10 interfere with his ability to initiate or maintain future employment. It  
11 is recommended that he be referred for a psychiatric consultation to  
12 review treatment options. A referral for individual counseling services  
13 is also recommended in attempts to target his mental health  
14 symptoms. From a psychological perspective, [Plaintiff's] prognosis is  
15 viewed as fair. At this time, he is unlikely to function adequately,  
16 and/or consistently in a work setting until his psychological symptoms  
17 have been managed more effectively.<sup>40</sup>

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15 <sup>38</sup> *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (requiring the ALJ to  
16 consider whether a claimant's mental-health impairment caused the claimant's  
17 exaggerated symptoms); *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294,  
18 1209–1300 (9th Cir. 1999) (discouraging “chastis[ing] one with a mental  
19 impairment for the exercise of poor judgment”).

20 <sup>39</sup> Soc. Sec. Rlg. 18-3p (2018) (requiring the prescribed treatment to be expected to  
21 restore the individual's ability to engage in substantial gainful activity).

22 <sup>40</sup> AR 536.

1 Dr. Genthe opined that with available treatment Plaintiff would likely be impaired  
2 for 9–12 months.

3 The record reveals that Plaintiff established care for his anxiety, depression,  
4 ADHD, and other conditions with a primary care provider—Dr. Jennifer Knox—in  
5 February 2019.<sup>41</sup> Dr. Knox, who had also treated Plaintiff in late 2018 after a  
6 motor vehicle accident, treated Plaintiff about 5 times after the initial  
7 establishment of care in February 2019. As the ALJ highlighted, Dr. Knox’s  
8 October 2019 treatment note—her final note in this record—indicated that  
9 Plaintiff’s symptoms had improved.<sup>42</sup> The October 2019 treatment note states<sup>43</sup>:

10 **Problem # 1: PSYCHOSIS (ICD-298.9) (ICD10-F29)**

11 Suspect psychotic disorder NOS. He appears much improved from previous visits; namely his thoughts are much more  
organized, as is his speech. He appears much better today. We will increase the risperdal from 1 mg bid to 1 mg qam and  
2 mg qpm.

12 In the past the pt was so disorganized that we were not able to address nightmares and anxiety. I do not recall him  
mentioning this. Now, however, he is able to articulate his concerns and anxiety and nightmares are at the forefront.

13 Dr. Knox mentioned that Plaintiff’s thoughts and speech were previously so  
14 impaired that he was unable to fully articulate his medical concerns; and Dr. Knox  
15 suspected a psychotic disorder. Consistent with Dr. Knox’s statement that  
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17 <sup>41</sup> AR 457–59.

18 <sup>42</sup> AR 445–49, 551–54.

19 <sup>43</sup> AR 554. *See Orn v. Astrue*, 495 F.3d 625, 634 (9th Cir. 2007) (requiring that  
20 examination notes be read in their context, as “[t]he primary function of medical  
21 records is to promote communication and recordkeeping for health care  
22 personnel—not to provide evidence for disability determinations”).  
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1 Plaintiff's symptoms were previously more severe, other medical records indicate  
2 that Plaintiff had poor hygiene, was verbally abusive toward staff, had abnormal  
3 thought content, or pressurized speech.<sup>44</sup> Given the abnormal observations by  
4 Dr. Genthe, Dr. Knox, and other providers, the ALJ must more meaningfully  
5 explain how Plaintiff's noted improvement during a single medical appointment in  
6 October provides substantial evidence of sustained improvement sufficient to  
7 discount Dr. Genthe's opinion.<sup>45</sup>

8 Finally, the ALJ discounted Dr. Genthe's opinion that Plaintiff had a  
9 marked limitation in maintaining appropriate behavior because Plaintiff  
10 demonstrated an ability to recognize his inappropriate behavior and apologize for  
11 it. Whether a medical opinion is consistent with the evidence from other medical  
12 sources and nonmedical sources is a critical factor for the ALJ to consider.<sup>46</sup> Here,

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14 <sup>44</sup> AR 555–72.

15 <sup>45</sup> See *Attmore v. Colvin*, 827 F.3d 872, 878 (9th Cir. 2016) (“It is the nature  
16 of bipolar disorder that symptoms wax and wane over time.”); *Garrison v. Colvin*,  
17 759 F.3d 995, 1017 (9th Cir. 2014) (“Cycles of improvement and debilitating  
18 symptoms are a common occurrence, and in such circumstances it is error for an  
19 ALJ to pick out a few isolated instances of improvement over a period of months or  
20 years and to treat them as a basis for concluding a claimant is capable of  
21 working.”).

22 <sup>46</sup> 20 C.F.R. §§ 404.1520c(c), 416.920c(c).  
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1 in finding that Plaintiff's difficulty with maintaining appropriate behavior was not  
2 as severe as Dr. Genthe opined, the ALJ relied on Plaintiff's behavior during two  
3 medical appointments.<sup>47</sup> The first was a May 21, 2019 appointment with Dr. Knox,  
4 wherein Plaintiff apologized for being abrasive and losing his temper during his  
5 last appointment.<sup>48</sup> Although Plaintiff apologized and was friendly and cooperative  
6 with an intact memory and was redirectable, Dr. Knox noted that Plaintiff's speech  
7 was pressured and rapid, and she referred him to psychiatry.<sup>49</sup> The other cited  
8 record is a July 23, 2019 treatment note stating:

9 Abusive behavior of staff. [Patient] counseled that we want to help  
10 him and work with him, but verbal and or physical behavior toward  
11 any staff member will not be tolerated. [Patient] verbalized  
12 understanding once more calm.  
Office visit conducted with additional help /security from Engineering  
staff to ensure safety of staff.<sup>50</sup>

13 That Plaintiff apologized for extreme behavior does not lessen the fact that he  
14 engaged in abusive conduct at medical appointments—conduct that would also be  
15 inappropriate in a work setting. These cited records do not offer substantial  
16 evidence supporting the ALJ's decision to discount Dr. Genthe's opinion that  
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19 <sup>47</sup> AR 25 (citing AR 557, 569).

20 <sup>48</sup> AR 569–72.

21 <sup>49</sup> AR 569–72.

22 <sup>50</sup> AR 557.



1 Plaintiff would have a marked limitation maintaining appropriate behavior in the  
2 workplace.

3 The ALJ's offered reasons for discounting Dr. Genthe's opinion are not  
4 supported by meaningful explanation or substantial evidence.

5 3. Dr. MacLennan

6 Two days after Dr. Genthe's evaluation in February 2019, Dr. MacLennan  
7 conducted a psychological evaluation of Plaintiff.<sup>51</sup> She reviewed some treatment  
8 records, interviewed Plaintiff, and assessed Plaintiff's mental status, finding that  
9 Plaintiff had good memory recall but poor attention and calculation, that he was  
10 able to follow a simple 3-step instruction, and that he failed to write a complete  
11 sentence. Dr. MacLennan diagnosed Plaintiff with PTSD (complex and chronic),  
12 rule out learning disabilities or neurocognitive disorder, and personality traits  
13 including dependency disorder. Dr. MacLennan noted that Plaintiff was a very  
14 poor historian and confusing to interview, as there were multiple inconsistencies in  
15 his report during the interview and he endorsed experiencing almost every  
16 symptom on a written checklist "most or all of the time."<sup>52</sup> Dr. MacLennan found  
17 Plaintiff's mental status was consistent with learning, attention, and calculation  
18 problems. Dr. MacLennan wrote:

19 [Plaintiff] appears to have difficulty with reasoning, appears to have  
20 limited judgment and limited impulse control. He appears to lack

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21 <sup>51</sup> AR 435–44.

22 <sup>52</sup> AR 441.

1 insight into his own condition. He appears unaware of and  
2 unconcerned about the effect of his behavior on others around him. He  
3 appears to have difficulty following and participating in a  
4 conversation. He appears to have difficulty with sustained  
5 concentration, pace and persistence, that would interfere with his  
6 ability to function at work.<sup>53</sup>

7 The ALJ discounted Dr. MacLennan's opinion because 1) the issue as to  
8 whether Plaintiff can work is an issue reserved to the Commissioner, 2) Plaintiff  
9 possibly exaggerated his symptoms and therefore his self-reports did not represent  
10 his actual functioning, and 3) Plaintiff demonstrated an ability to perform tasks  
11 supportive of greater capability, such as independent daily-living activities,  
12 managing appointments, and volunteering at a senior center.<sup>54</sup>

13 First, although a statement by a medical source that a claimant is "unable to  
14 work" is not controlling on the Commissioner, the ALJ was required to consider all  
15 the medical findings and other evidence supporting Dr. MacLennan's statement  
16 that Plaintiff would have difficulty functioning at work due to difficulty with  
17 sustained concentration, pace, and persistence.<sup>55</sup> As required, the ALJ proceeded to  
18 consider whether Dr. MacLennan's observations, findings, and Plaintiff's reported  
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20 <sup>53</sup> AR 441.

21 <sup>54</sup> AR 26–27.

22 <sup>55</sup> 20 C.F.R. §§ 404.1527(d), 416.927(d).

1 symptoms to Dr. MacLennan were consistent with and supported by the record.<sup>56</sup>  
 2 But the ALJ did so in a manner that selectively favored evidence contrary to  
 3 Dr. MacLennan's opinion.<sup>57</sup> While—as the ALJ highlighted—Dr. MacLennan  
 4 questioned whether Plaintiff exaggerated his inabilities, Dr. MacLennan also  
 5 questioned whether Plaintiff's inconsistent answers and confusing interview style  
 6 were the result of learning and memory barriers:

7 Further assessment would help clarify to what extent his learning and  
 8 memory are barriers that interfere with employment for him.  
 9 Hopefully a more thorough medical workup will help determine his  
 10 medical/physical condition. [Plaintiff] said his roommate gives him his  
 11 check and his bills and that he . . . pays them all; he also said he can't  
 12 do any of those things. I have no idea which is more accurate. Further  
 investigation is necessary to determine whether he is able to handle  
 his own funds in a responsible manner, or whether he was  
 exaggerating his inability to provide reasonable and consistent  
 answers to very simple questions.<sup>58</sup>

13 Dr. MacLennan's opinion that Plaintiff had difficulty with reasoning, impulse  
 14 control, insight, interactions with others, and sustained concentration, pace, and  
 15 persistence was not only based on Plaintiff's self-reports, but also on her own  
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17 <sup>56</sup> *Id.* §§ 404.1520c, 416.920c; *Lingenfelter*, 504 F.3d at 1042 (recognizing the ALJ is  
 18 to consider the consistency of the medical opinion with the record as a whole).

19 <sup>57</sup> *See also Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984) (disallowing the  
 20 ALJ from cherry picking evidence to support a conclusion that contradicts the  
 21 overall diagnostic record).

22 <sup>58</sup> AR 442.  
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1 observations and interactions with Plaintiff, the mental-status examination, and  
2 review of three medical records from 2018.<sup>59</sup> Dr. MacLennan's observations and  
3 findings were also consistent with several observations and findings by treatment  
4 providers that Plaintiff had tangential talking and thought-process, poor hygiene,  
5 and inability to focus.<sup>60</sup> And, as noted above, SSA staff mentioned that although  
6 Plaintiff was polite and pleasant during the interview, he struggled with  
7 concentration, staying on topic, and giving too much detail.<sup>61</sup>

8         Instead of meaningfully discussing the evidence supporting  
9 Dr. MacLennan's opinion, the ALJ focused on Dr. MacLennan's comment that  
10 Plaintiff may be "exaggerating his inability to provide reasonable and consistent  
11 answers to very simple questions": a comment prefaced with Dr. MacLennan's  
12 recommendation that "[f]urther assessment would help clarify to what extent  
13 [Plaintiff's] learning and memory are barriers that interfere with employment for  
14 him."<sup>62</sup> Without more record development or discussion by the ALJ as to why

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16 <sup>59</sup> See *Buck*, 869 F.3d at 1049 (Psychologist's opinion was based on a clinical  
17 interview and mental status evaluation and partially relied on the claimant's self-  
18 reports; partial reliance on self-reported symptoms was not a valid reason to reject  
19 the opinion.).

20 <sup>60</sup> See, e.g., AR 450–52, 457–59, 565–68, 577–78, 580–81.

21 <sup>61</sup> AR 338.

22 <sup>62</sup> AR 442.

1 Dr. MacLennan's opinion was inconsistent with and unsupported by the record, the  
2 ALJ's analysis is not supported by substantial evidence.

3 Finally, the ALJ discounted Dr. MacLennan's opinion because it was  
4 inconsistent with Plaintiff's ability to perform tasks indicative of greater capacity,  
5 including independent activities of daily living, managing his appointments, and  
6 volunteering at a senior center. An ALJ may consider whether the medical opinion  
7 is inconsistent with the claimant's level of activity.<sup>63</sup> However, "disability  
8 claimants should not be penalized for attempting to lead normal lives in the face of  
9 their limitations."<sup>64</sup> As to self-care and daily chores, Plaintiff reported to Dr.  
10 MacLennan that he could perform self-care and chores, although he was afraid of  
11 showering. Dr. MacLennan did question whether Plaintiff had the ability to  
12 manage paying bills because he did not demonstrate the ability to manage such  
13 tasks during the examination; instead, Dr. MacLennan stated Plaintiff's "mental  
14 status was consistent with learning problems, attention and calculation  
15 problems."<sup>65</sup> And contrary to Plaintiff's self-report that he adequately performed  
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17 <sup>63</sup> *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Fair v. Bowen*, 885 F.2d  
18 597, 603 (9th Cir. 1989).

19 <sup>64</sup> *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (cleaned up).

20 <sup>65</sup> AR 441. An ALJ must consider the basis for the limitations and not discount  
21 because of nonrelevant normal findings. *See Ghanim v. Colvin*, 763 F.3d 1154, 1164  
22 (9th Cir. 2014) (finding the ALJ erred by rejecting the claimant's symptoms  
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1 self-care, the record reflects that Plaintiff was homeless for about 6 weeks during  
2 the relevant period and that he had difficulties with hygiene.<sup>66</sup> This self-care  
3 record does not provide substantial evidence supporting the ALJ's decision to  
4 discount Dr. MacLennan's opinion.

5 As to managing appointments, the record reflects that Plaintiff attended  
6 appointments for physical and mental medical conditions during the relevant  
7 period fairly consistently until October 18, 2019, and then there is a break in the  
8 medical records until Plaintiff sought emergency treatment for a seizure and  
9 resulting headache in May 2020.<sup>67</sup> Plaintiff's medical treatment reflects an ability  
10 to perform activities within a schedule and maintain regular attendance. However,  
11 Dr. MacLennan's opined difficulties were not centered on any inability to show up  
12 for work but rather were based on Plaintiff's (in)ability to function while *at* the  
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14  
15 resulting from anxiety, depressive disorder, and PTSD on the basis that claimant  
16 performed cognitively well during examination and had a generally pleasant  
17 demeanor).

18 <sup>66</sup> AR 562–68. *See Diedrich v. Berryhill*, 874 F.3d 634, 643 (9th Cir. 2017)  
19 (recognizing that the fact the claimant “could participate in some daily activities  
20 does not contradict the evidence of otherwise severe problems that she encountered  
21 in her daily life during the relevant period”).

22 <sup>67</sup> *See, e.g.*, AR 551–54, 592–93.  
23

1 workplace.<sup>68</sup> Questions remain whether, for instance, he would distract coworkers  
2 and could adapt to work situations, control his impulses, and/or sustain  
3 concentration, pace, and persistence. The medical record reflects that Plaintiff  
4 struggled with maintaining appropriate behavior and communicating effectively,  
5 given that he was abrasive with medical staff, had pressured speech, and had a  
6 seizure in April 2019 causing confusion.<sup>69</sup> On remand, the ALJ must meaningfully  
7 explain why Plaintiff's ability to manage medical appointments is inconsistent with  
8 Dr. MacLellan's opined limitations.

9 Finally, the ALJ found Dr. MacLellan's opinion inconsistent with Plaintiff's  
10 report that he helps a woman at the senior center, where he also plays Beethoven  
11 on the piano. But Plaintiff also advised Dr. MacLennan that he does not really  
12 have friends, does not have a phone, does not go to his sister's house although he  
13 lives across the street from his sister, and he does not go to church.<sup>70</sup> Without more  
14 details as to how often Plaintiff visits the senior center and what he does there,

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16 <sup>68</sup> Like Dr. MacLennan, Dr. Genthe's marked limitations pertained to Plaintiff's  
17 adaptive, communication, behavioral, and concentration/pace/persistence abilities.  
18 As to Plaintiff's ability to perform activities within a schedule, maintain regular  
19 attendance, and being punctual within customary tolerances without special  
20 supervision, Dr. Genthe only opined a moderate limitation. AR 536.

21 <sup>69</sup> See, e.g., AR 511–13, 516–17, 573–83.

22 <sup>70</sup> AR 440.

1 this single, vague reference to helping a woman at the senior center and playing  
2 the piano does not constitute substantial evidence supporting the ALJ's decision to  
3 discount Dr. MacLennan's opinion.<sup>71</sup>

4 4. Consequential Error

5 The ALJ erred when analyzing Dr. Genthe's and Dr. MacLennan's  
6 examining opinions. These errors are consequential because the vocational expert  
7 testified that an individual who has pressured or disorganized speech may  
8 negatively affect their own or coworker's productivity.<sup>72</sup> And to maintain  
9 competitive employment an employee must maintain appropriate behavior and  
10 adequate concentration, persistence, and pace.

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11  
12 <sup>71</sup> See *Smolen v. Chater*, 80 F.3d 1273, 1287 n.7 (9th Cir. 1996) (recognizing that  
13 "many home activities may not be easily transferable to a work environment where  
14 it might be impossible to rest periodically or take medication"); *Vertigan v. Halter*,  
15 260 F.3d 1044, 1050 (9th Cir. 2001) (emphasizing that simply because a claimant  
16 can carry on certain daily activities does not detract from his credibility as to his  
17 overall disability if the activities do not consume a substantial part of the day and  
18 do not reflect the ability to sustain fulltime work).

19 <sup>72</sup> AR 71–73. Because these errors are consequential, the Court need not address  
20 Plaintiff's argument that the ALJ failed to incorporate Dr. Nance's testimony that  
21 there was a potential for Plaintiff to distract coworkers because of his speech and  
22 thought patterns. See AR 58–59.



**B. Symptom Reports: The ALJ must reconsider on remand.**

Plaintiff argues the ALJ failed to provide valid reasons for discounting his symptom reports. Because the case is being remanded for further consideration of the medical opinions, the Court does not address Plaintiff's symptom-report arguments in full but does address some of Plaintiff's concerns about the ALJ's analysis.

First, the ALJ discounted Plaintiff's demonstrated irritability and aggressive and uncooperative behavior because Plaintiff "himself attributed [such behavior] . . . to the passing of his father in March 2019."<sup>73</sup> Because there was concern by Dr. MacLennan and Dr. Knox whether Plaintiff had true insight into the nature of his mental-health conditions, relying on Plaintiff's own attribution as to the cause for his irritability and aggressive behavior is questionable, particularly as Dr. Knox questioned whether Plaintiff's anger was a side-effect of the seizure medication.<sup>74</sup> Moreover, Dr. Genthe and Dr. MacLennan evaluated Plaintiff before his father passed and both examiners expressed concern about Plaintiff's ability to maintain behavior at the workplace.

The ALJ also discounted Plaintiff's symptoms because a treating provider questioned whether Plaintiff's behavior was caused by drug use.<sup>75</sup> Drug-seeking

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<sup>73</sup> AR 23.

<sup>74</sup> AR 511.

<sup>75</sup> AR 23 (citing AR 575).

1 behavior can be a clear and convincing reason to discount a claimant's reported  
2 symptoms.<sup>76</sup> Yet, the ALJ must consider this drug-use speculation in the context of  
3 the record. The treatment record noted that Plaintiff's speech was pressured, and  
4 he was repeating himself, pacing, irritable, and angry.<sup>77</sup> Dr. Knox wrote that  
5 Plaintiff "[s]tates he threw his sertraline away because it didn't work. Today I am  
6 concerned for either drug use or mania," and Dr. Knox mentions that Plaintiff  
7 became upset when he did not receive opiates for his back pain.<sup>78</sup> Then, during an  
8 appointment two weeks later with Dr. Knox for a hand fracture incurred after  
9 Plaintiff hit a metal object when upset, Plaintiff's speech was again pressured and  
10 rapid despite being friendly, cooperative, and redirectable.<sup>79</sup> Dr. Knox referred  
11 Plaintiff to psychiatry and continued Plaintiff on Valium because Plaintiff was "far  
12 too activated and anxious to think rationally [and] interestingly . . . does not  
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14 <sup>76</sup> See *Edlund v. Massanari*, 253 F.3d 1152, 1157 (9th Cir. 2001) (holding that  
15 evidence of drug seeking behavior undermines a claimant's reported symptoms);  
16 *Gray v. Comm'r, of Soc. Sec.*, 365 F. App'x 60, 63 (9th Cir. 2010) (recognizing that  
17 evidence of drug-seeking behavior is a valid reason for discounting a claimant's  
18 symptom claims).

19 <sup>77</sup> AR 573–76.

20 <sup>78</sup> AR 575. See also AR 577 (stating he has been working very hard for last 18 days);  
21 AR 581 (mentioning that Plaintiff is digging ditches).

22 <sup>79</sup> AR 569–72.  
23

1 appear manic despite incredibly pressured speech.<sup>80</sup> And during an emergency-  
2 room visit during this same period, the medical record indicates a suspicion that an  
3 underlying mental health disorder was undiagnosed and untreated.<sup>81</sup> Moreover,  
4 the drug screens of record do not reflect drug use beyond Plaintiff's admitted  
5 marijuana use and prescribed medications.<sup>82</sup> On this record, without more  
6 explanation by the ALJ, the mention that a treating provider questioned whether  
7 Plaintiff's behavior was caused by either drug use or mania does not constitute  
8 substantial evidence to discount Plaintiff's symptom reports.

9       Also, when considering Plaintiff's symptom reports, the ALJ must reassess  
10 whether Plaintiff's activities of daily living are inconsistent with his reported  
11 symptoms. The ALJ must more meaningfully explain why the ability to perform  
12 self-care, attend appointments, and engage in very limited social activities are  
13 inconsistent with Plaintiff's symptom reports, including that he requires  
14 instructions to be repeated at his sheltered employment and that his seizure  
15 medication causes side effects such as anger and depression.

16       Finally, reports of improvement in mental health "must be interpreted with  
17 an understanding of the patient's overall well-being and the nature of [his]  
18 symptoms," as well as with an awareness that "improved functioning while being  
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20 <sup>80</sup> AR 571.

21 <sup>81</sup> AR 581.

22 <sup>82</sup> AR 416, 601, 602.

1 treated and while limiting environmental stressors does not always mean that a  
 2 claimant can function effectively in a workplace.”<sup>83</sup>

3 **C. Remand: Further proceedings are necessary.**

4 Plaintiff asks for a payment of benefits for the closed period on remand.  
 5 However, the ALJ’s errors when analyzing the medical records require further  
 6 proceedings on remand, because disability is not clearly established for this closed  
 7 period.<sup>84</sup>

8 On remand, the ALJ is to develop the record by 1) obtaining medical records  
 9 through June 15, 2021,<sup>85</sup> 2) requesting a statement from a supervisor at Plaintiff’s  
 10 sheltered employment,<sup>86</sup> 3) requesting a medical opinion from Dr. Knox (or another

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12 <sup>83</sup> *Garrison*, 759 F.3d at 1017 (cleaned up). *See also Thompson v. Schweiker*, 665  
 13 F.2d 936, 939 (9th Cir. 1982) (recognizing that the ability to engage in sheltered  
 14 work does not correspond to an ability to engage in fulltime gainful work).

15 <sup>84</sup> *See Leon v. Berryhill*, 800 F.3d 1041, 1045 (9th Cir. 2017); *Garrison*, 759 F.3d at  
 16 1020.

17 <sup>85</sup> Obtaining medical records for a one-year period after the closed disability period  
 18 will assist the ALJ in determining whether Plaintiff’s improvement at the October  
 19 2019 appointment is consistent with sustained improvement or temporary  
 20 improvement.

21 <sup>86</sup> *Hearings, Appeals, and Litigation Law Manual* I-2-5-62 (obtaining additional  
 22 evidence from non-medical sources).  
 23

treating provider), 4) ordering intelligence testing to ascertain Plaintiff's reading and comprehension abilities, and 5) obtaining, if necessary, new testimony from a psychological expert.<sup>87</sup> The ALJ is to then reconsider the medical evidence, Plaintiff's symptom reports, and reevaluate the sequential process.

## V. Conclusion

Plaintiff establishes the ALJ erred. The ALJ is to develop the record and reevaluate—with meaningful articulation and evidentiary support—the sequential process.


Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **GRANTED**.
2. The Commissioner's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.
3. The Clerk's Office shall enter **JUDGMENT** in favor of **Plaintiff**.
4. This matter is **REVERSED** and **REMANDED** to the **Commissioner of Social Security** for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

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<sup>87</sup> The ALJ always has a special duty to fully and fairly develop the record" to make a fair determination as to disability. *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003) (cleaned up). See 20 C.F.R. §§ 404.1512(b), 416.912(b).

IT IS SO ORDERED. The Clerk's Office is directed to file this order and provide copies to all counsel.

  
EDWARD F. SHEA  
Senior United States District Judge